Supreme Court, U. S.
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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-1803

THE DIVISION OF BEVERAGE, DEPARTMENT OF BUSINESS REGULATION, an agency of the STATE OF FLORIDA,

Petitioner,

v.

BONANNI SHIP SUPPLY, INC.,

Respondent.

****

ON WRIT OF CERTIORARI
TO THE FLORIDA SUPREME COURT

****

PETITION FOR WRIT OF CERTIORARI

****

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IN THE SUPREME COURT OF THE UNITED STATES

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ON WRIT OF CERTIORARI
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PETITION FOR WRIT OF CERTIORARI

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Petitioner prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Florida filed on March 9, 1978.

CITATIONS TO OPINIONS BELOW

On March 9, 1978, the Supreme Court of Florida filed an opinion in this cause. That opinion is found at 356 So.2d 308 (Fla. 1978). That appeal was from an order of the Thirteenth Judicial Circuit in and for Hillsborough County, Florida, rendered on March 16, 1977. The Circuit Court's

opinion is unpublished. The two court decisions are set out in the Appendix hereto, pp. 17, 14.

JURISDICTION

The Florida Supreme Court opinion was filed on March 9, 1978, and stated that it became final on the date of expiration of the period for filing a petition for rehearing, that date being March 24, 1978. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(3).

Jurisdiction of the Circuit Court in and for Hillsborough County, Florida, was founded upon Chapter 86, Florida Statutes, wherein Bonanni sought declaratory and injunctive relief against the Division's enforcement of the statute. After the Circuit Court held the statute to be unconstitutional, the jurisdiction of the Florida Supreme Court was invoked pursuant to Article V, §3(b)(1) of the Florida Constitution, which afforded an appeal as a matter of right in such cases. Subsequent to the Supreme Court's order of March 9, 1978, the Division filed a Motion to Stay the Effect of the Court's Order on April 21, 1978. The Florida Supreme Court denied that motion on April 24, 1978.

QUESTIONS PRESENTED

1. Whether Florida's requirement that exporters of alcoholic beverages obtain licenses under §561.14(4), Florida Statutes (1975), creates an undue burden on interstate commerce in violation of the Commerce Clause.

2. Whether the Florida Supreme Court erred in holding that §561.14(4), Florida Statutes (1975), was an unreasonable burden on interstate commerce because of the presence of concurrent federal regulation of exporters.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

CONSTITUTION OF THE UNITED STATES

ARTICLE I, § 8

(Clause 3) The Congress shall have power ... to regulate commerce with foreign nations, and among the several states and with the indian tribes: ...

AMENDMENT XXI

Section 2. The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

FLORIDA STATUTES (1975)

Section 561.14 License classification.--

Licenses referred to in the beverage law shall be classified as follows:

(4) Exporters licensed to transport tax exempt alcoholic beverages into this

state under bond, to be exported under bond for delivery beyond the borders of this state. Each license shall entitle the licensee to store such beverages under bond at one location in this state pending shipment beyond the borders of this state. Florida Statutes, 1975, Volume II, page 932.

STATEMENT OF THE CASE

Petitioner Division of Alcoholic Beverages and Tobacco, Department of Business Regulation, is an agency of the State of Florida. The Respondent, Bonanni Ship Supply, Inc., is a corporation doing business in Tampa, Florida, and licensed by the Petitioner as an exporter of alcoholic beverages.

In October of 1975, Bonanni sought declaratory and injunctive relief against the Division from enforcing §561.14(4), Florida Statutes, which required the Respondent to hold an exporter's license while engaged in the import-export of alcoholic beverages through Florida and entirely within interstate commerce. Bonanni claimed in its Complaint that the Florida statute was in excess of Florida's powers under the 21st Amendment. Cross-motions for summary judgment were filed and in that pleading, Bonanni claimed the statute was violative of the Commerce Clause. On March 17, 1977, the Honorable Vernon W. Evans, Jr., Judge of the Circuit Court for the Thirteenth Judicial Circuit in Hillsborough County, Florida, entered a final summary judgment in favor of Bonanni, holding in part that:

The requirement that Plaintiff obtain an exporter's license from the State of Florida to engage in the business of importing and exporting "in bond" merchandise for distribution and use in foreign commerce, violates the provisions of the Commerce Clause of the United States Constitution. (Article I, Section 8, Clause 3). Accordingly, §561.14(4), Florida Statutes, is hereby declared unconstitutional and invalid as being violative, and in contravention, of the Constitution of the United States of America. Appendix, pp. 17.

The Petitioner filed a Motion for Rehearing which was denied, and thereafter sought immediate review of the Circuit Court's decision in the Florida Supreme Court pursuant to Article V, Section 3(b)(1), of the Florida Constitution which provides for such an appeal as a matter of right. After the Court's unfavorable decision of March 9, 1978, the Division filed a Motion to Stay the Effect of that Court's Order on April 21, 1978. The Florida Supreme Court denied that motion on April 24, 1978. Appendix pp. 25, 31.

REASONS FOR GRANTING THE WRIT

I. FLORIDA'S REQUIREMENT THAT EXPORTERS OF ALCOHOLIC BEVERAGES OBTAIN LICENSES UNDER §561.14(4), FLORIDA STATUTES, DOES NOT CREATE AN UNDUE BURDEN ON INTERSTATE COMMERCE IN VIOLATION OF THE COMMERCE CLAUSE.

This Court has previously held in United States v. State Tax Commission of Mississippi, 412 U.S. 363, 93 S. Ct. 2183, 37 L. Ed.2d 1 (1973), that in the absence of conflicting federal regulation, a state may regulate and control shipments of liquor through its borders insofar as is necessary to prevent the unlawful diversion of the liquor into its internal commerce.

Florida's statute speaks only to the licensing of exporters, in a manner which is in accord with the dictates of United States v. State Tax Commission of Mississippi, supra, and Hostetter v. Idlewild Bon Voyage Liquor Corporation, 377 U.S. 324, 331 n. 10, 84 S. Ct. 1293, 12 L. Ed.2d 350 (1963).

The Florida Supreme Court, however, has misapplied the federal principle that there must be a finding of an undue burden on interstate commerce to invalidate a state license classification statute. In the same breath they have held, as Bonanni has agreed, (Appendix pp. 24, Note 6), that nothing in their opinion shall be considered a prohibition against the State from requiring exporters to be registered for identification purposes.

Section 561.14(4), Florida Statutes, by itself, imposes no duties on the exporter to be bonded, pay fees, file reports or have their inventories inspected. These requirements arose from supporting statutes and administrative rules promulgated by the Division of Alcoholic Beverages and Tobacco under that statute. In an effort to reach the amplifying statutes and rules,

the Court has invalidated §561.14(4) - a simple classification statute. In doing so, the Florida Supreme Court has misapplied the doctrine of undue burden upon interstate commerce to strike down a license classification statute that in principle they admit is permissible. In doing so, they have construed this Petitioner's rights derived from the parameters of the 21st Amendment, the Commerce Clause and the cases previously decided by this Court.

This Petitioner is faced with the untenable position of establishing a license classification for alcoholic beverage merchants dealing in export goods within its jurisdiction, and trying to reconcile the Florida Supreme Court's interpretation that such would be undue burden upon the Interstate Commerce Clause. In effect, this agency is excluded from exercising a police power identification system for exporters solely on the theory that the federal government has established concurrent jurisdiction. The presence of federal regulation does not preclude a state from promulgating regulatory classifications consistent with protecting state interests in possible diversion of nontax paid alcoholic beverages into intrastate commerce. Section 561.14(4), Florida Statutes, does no more than permit the state to identify those persons authorized to warehouse and transport these commodities. If the decision of the Florida Supreme Court stands, it represents a radical departure from this Court's parameters of a state's police power vis a vis the Interstate Commerce Clause and the 21st Amendment.

II. THE FLORIDA SUPREME COURT ERRED IN HOLDING THAT §561.14(4), FLORIDA STATUTES (1975), WAS AN UNREASONABLE BURDEN ON INTERSTATE COMMERCE BECAUSE OF THE PRESENCE OF CONCURRENT FEDERAL REGULATION OF EXPORTERS.

The Circuit Court's order initially holding §561.14(4), Florida Statutes, unconstitutional was based on its determination that the statute violated the provisions of the Commerce Clause and was, therefore, violative and in contravention of the Constitution of the United States. Appendix, pp. 14. However, in its opinion affirming the Circuit Court, the Florida Supreme Court has, in effect, announced a new test for this state's police power: when confronted with the Interstate Commerce Clause, state regulation must fail. In Duckworth v. Arkansas, 314 U.S. 390, 62 S. Ct. 311, 86 L. Ed. 294 (1941), this Court restrained Arkansas from imposing what it found to be unnecessary or burdensome regulation on liquor in interstate commerce. In light of this Court's prior cases, the Florida Supreme Court has blurred the distinction between the test for an undue burden on interstate commerce, and the doctrine of federal preemption. This Court has previously held in United States v. State Tax Commission of Mississippi, supra, that it is conflicting state regulaton which is objectionable, and not coexisting regulation. However, the Florida Supreme Court's test was not undue burden on interstate commerce, but whether there was duplicative federal regulation. Indicative of the test it applied, the Florida Supreme Court's order stated that:

> We must conclude that the state's attempt to monitor for diversion is merely duplicative of the federal effort. Under these circumstances, the federal regulatory activity in the Commerce Clause of the United States Constitution precludes state regulation. Appendix, pp. 33.

The Florida Supreme Court has misinterpreted the Commerce Clause and this Court's holding in prior cases; the test is still and ought to be whether or not a state statute creates an undue burden on interstate commerce, and not whether it is duplicative of the federal effort to regulate the field as well. The Florida Supreme Court has, in effect, chosen to apply the doctrine of federal preemption to the existing dual regulation of alcohol in interstate commerce, thereby ignoring this Court's previous holdings, and the State's own inherent police power over liquor pursuant to the 21st Amendment.

The Court below, therefore, has decided a substantial federal question in a way disregarding and in conflict with applicable decisions in this Court, so that certiorari should be granted, pursuant to Supreme Court Rule 19(a).

CONCLUSION

For the reasons set forth above, Petitioner prays that the Petition for Certiorari be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three (3) copies of the foregoing Petition for Writ of Certiorari have been furnished by U.S. Mail to Robert V. Williams, Esquire, 606 Madison Street, Post Office Box 1363, Tampa, Florida 33601, Attorney for Respondent, this 19th day of June, 1978.

Francis Bayley
Francis Bayley

IN THE SUPREME COURT OF THE UNITED STATES

No. _____

THE DIVISION OF BEVERAGE, DEPARTMENT OF BUSINESS REGULATION, an agency of the STATE OF FLORIDA,

Petitioner,

v.

BONANNI SHIP SUPPLY, INC.,

Respondent.

****

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT OF THE STATE OF FLORIDA, IN AND FOR HILLSBOROUGH COUNTY.

BONANNI SHIP SUPPLY, INC.,

Plaintiffs,

-vs- CASE NO. 76-10612

DIVISION "A"

THE DIVISION OF BEVERAGE OF THE DEPARTMENT OF BUSINESS REGULATION, an agency of the State of Florida,

Defendant.

SUMMARY FINAL JUDGMENT

THIS CAUSE came on for final hearing on the motions of both parties for summary final judgment, and the Court having examined the record on file, the briefs of counsel, and having heard oral argument of counsel for each party, and being otherwise advised, it is,

ADJUDGED and ORDERED that:

1. This is an action for a declaratory judgment challenging the constitutionality of a portion of the Florida Beverage Law; Administration (Chapter 561, Florida Statutes) and for injunctive relief.

2. This Court has jurisdiction of the subject matter and of the parties.

3. There is no genuine issue of material fact.

4. The Plaintiff is entitled to a judgment as a matter of law.

5. It is, therefore, the holding of this Court that the requirement that Plaintiff obtain an exporter's license from the State of Florida to engage in the business of importing and exporting "in bond" merchandise for distribution and use in foreign commerce, violates the provisions of the Commerce Clause of the United States Constitution (Article I, Section 8, Clause 3). Accordingly, Section 561.14(4), Florida Statutes is hereby declared unconstitutional and invalid as being violative, and in contravention, of the Constitution of the United States of America.

6. The Defendant, THE DIVISION OF BEVERAGE OF THE DEPARTMENT OF BUSINESS REGULATION, an agency of the State of Florida, and all those acting as agents, employees, or representatives of the DIVISION OF BEVERAGE OF THE DEPARTMENT OF BUSINESS REGULATION are hereby enjoined from enforcing or attempting to enforce against BONANNI SHIP SUPPLY, INC., the licensing requirements imposed by Section 561.14(4), Florida Statutes and from enforcing or attempting to enforce against BONANNI SHIP SUPPLY, INC., any and all auditing, reporting, bonding or other regulatory provisions of Chapter 561, Florida Statutes to the extent that such regulatory provisions are applied to BONANNI SHIP SUPPLY, INC. by reason of Section 561.14(4), Florida Statutes.

DONE and ORDERED at Tampa, Florida, this 16th day of March, 1977.

/s/
VERNON W. EVANS, JR.
Circuit Judge

Copies furnished to:

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NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING PETITION AND, IF FILED, DETERMINED.

IN THE SUPREME COURT OF FLORIDA

JANUARY TERM, 1978

THE DIVISION OF BEVERAGE, DEPARTMENT OF BUSINESS REGULATION, an agency of the STATE OF FLORIDA, Appellant,	
v.	CASE NO. 51,582
BONANNI SHIP SUPPLY, INC., Appellee.	Circuit Court Case No. 75-10612 Division "A"

Opinion filed March 9, 1978

An Appeal from the Circuit Court in and for Hillsborough County, Vernon W. Evans, Jr., Judge

Richard E. Gentry, Staff Attorney, Tallahassee, Florida, for Appellant

Robert V. Williams of the Law Firm of Gibbons, Tucker, McEwen, Smith, Cofer and Taub, Tampa, Florida, for Appellee

ENGLAND, J.

The circuit court for the Thirteenth Judicial Circuit entered final summary judgment in favor of appellee in a declaratory action brought against the Department of Business Regulation, in which it held §561.14(4), Florida Statutes (1975), to be in violation of the Commerce Clause of the United States Constitution.[1] That provision of the statute required Bonanni Ship Supply, Inc., to obtain an exporter's license from the State of Florida in order to engage in the business of importing and exporting "in-bond" merchandise for distribution and use solely in foreign commerce. Under Article V, §3(b)(1) of the Florida Constitution, the Department asks us to review the trial court's declaration of invalidity. The sole issue for review is whether the state's regulation of Bonanni's import-export activity constitutes an unreasonable burden on interstate commerce under the federal constitution.

There is no controversy as to either the facts in this case or the applicable standard of law. Both parties agree that the Commerce Clause of the United States Constitution permits a state to exercise reasonable police powers necessary to protect local interests, and that in this case the sole interest of the state is to prevent a diversion of liquor from foreign commerce into the stream of state distribution. Both parties also agree that the federal government has entered the regulatory field with respect

1. U.S. Const. art. I, §8, cl. 3.

to Bonanni's business, having imposed extensive procedural requirements which govern Bonanni's activities in transferring liquor through the port of Tampa.[2]

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2. Bonanni's business is subject to the Tariff Act of 1930, 19 U.S.C. §1311 et seq., the Alcoholic Beverage and Tobacco Products Provisions of the Internal Revenue Code of 1954, 26 U.S.C. §5001 et seq., and various regulations promulgated by the Department of the Treasury for the U.S. Customs Service, 19 C.F.R. §§1.1-177.11 (1977). In practice, these regulations translate into strict and pervasive controls over Bonanni's operations, as indicated by the following descriptive excerpt from the affidavit of the Assistant District Director of the Bureau of Customs in Tampa:

"When a shipment arrives in the port of Tampa the merchandise is off-loaded from the ship into a dock storage building which is under the control of the Bureau of Customs. The merchandise may not be removed from the dock storage building until a warehouse bond is filed by the importer at the United States' Customs House. . . .

After the warehouse bond is filed by the importer, authority is then given for the merchandise to be removed from the dock of arrival and is then transferred by a customs' bonded cartman, under strick customs supervision. This customs supervision includes an inventory of what leaves the dock storage building and what is delivered to the cartman. (con't).

The ultimate question we are called upon to answer is whether the state's supplementary regulations, as set forth in Chapter 561 of the Florida Statutes,

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2. (con't).

The imported merchandise is off-loaded from the bonded cartman to the bonded warehouse (which warehouse must meet specified construction requirements) again under strick customs' supervision. The bonded warehouse itself is under customs' lock and key and the importer, in this case Bonanni Ship Supply, Inc., does not have a key to the lock.

Before the importer may obtain any release of the merchandise in the bonded warehouse, certain documentation must be filed with the customs' house and approved before withdrawal is allowed. If the documentation is approved a customs' warehouse officer is sent to the bonded warehouse where he unlocks the warehouse premises and permits the importer to withdraw the prescribed goods from the bonded warehouse. At the time of such withdrawal, the customs' warehouse officer accounts and verifies the actual merchandise being withdrawn against the withdrawal.

Upon withdrawal from the bonded warehouse, the merchandise again goes to a bonded cartman where it is transported to the ship for delivery outside the territorial limits of the United States. Again this loading process is under customs' supervision and a receipt is always required from a responsible officer of the vessel certifying the merchandise that has

constitute an unreasonable burden on interstate commerce within the limitations established by the federal courts. This state's regulatory scheme with respect to Bonanni and like exporters consists of a $500 license fee, a $5,000 bond to protect against tax loss in the event merchandise is diverted into state commerce, monthly reports on the transfer of liquor into and out of the bonded warehouse in Tampa, and a semi-annual physical inspection of the bonded warehouse at which a customs' employee must be present.[3]

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2. (con't).

been delivered.

In addition to the above supervisory controls as to the importation and exportation of liquor and bond, the Bureau of Customs also conducts an annual inventory of the importers business the results of which are cross-checked against all records previously filed with the Bureau of Customs. The annual inventory results must, of course, coincide with the documentation which has been filed through the year by the importer regarding each shipment of liquor."

3. These requirements appear specifically in §§561.14(4) (license), 561.37 (bond), 561.41 (inspections), and 561.55 (reports), Florida Statutes (1975). When the Department conducts its semi-annual inspections Bonanni must pay a customs officer $50.00 per day, which amount is not reimbursed by the state.

Relying on Duckworth v. Arkansas, 314 U.S. 390 (1941), and Carter v. Virginia, 321 U.S. 131 (1944), the Department argues that a reasonable state regulation of foreign commerce is permissible to achieve the state's legitimate objective of preventing diversion to in-state commerce. Bonanni contends that Duckworth and Carter are not relevant in this case because both involved state regulation in areas devoid of any federal regulatory activity, and that Epstein v. Lordi, 261 F. Supp. 921 (D.N.J. 1966), aff'd, 389 U.S. 29 (1967), is more to the point. Epstein was a Commerce Clause case involving competing state and federal regulations.

Epstein is persuasive here, and we hold that the state's regulatory activity is not reasonably necessary to protect against diversion. On the record here, the federal regulatory scheme is more than adequate to detect any diversion from the importation, storage, and exportation of wholesale liquor passing through the State of Florida.

Obviously, the license fee and bonding requirement provide no protection for the state against diversion. Similarly, the filing of monthly reports offers nothing to the state which the federal government does not already have; indeed, Bonanni attaches to the state's form each month a copy of the report it files with the federal government for the same purpose. The one state activity that has no counterpart in the federal scheme of regulation is the semi-annual physical

inventory.[4] Since we can discern no information regarding diversion that might emerge from the state's physical inventory which would not also be revealed by the paper and physical inventories provided by the federal government, we must conclude that the state's attempt to monitor for diversion is merely duplicative of the federal effort. Under these circumstances the federal regulatory activity and the Commerce Clause of the United States Constitution preclude state regulation.[5]

---

4. The federal government apparently conducts an annual physical inventory against which Bonanni's reports are verified. See note 2 above. The record on this point is not entirely clear, but we can assume for purposes of this issue that the annual federal inventory differs to some extent from the state's semi-annual inventory.

5. In United States v. State Tax Comm'n, 412 U.S. 363, 307 (1973), the Court indicated that

> "a State may, in the absence of conflicting federal regulation, properly exercise its police powers to regulate and control [liquor] shipments during their passage through its territory insofar as necessary to prevent the 'unlawful diversion' of liquor into the internal commerce of the State' . . ." (Emphasis added)

See also Texas Liquor Control Bd. v. Ammex Warehouse Co., 384 S.W.2d 768 (tex. App. 1964), cert. denied, 382 U.S. 977 (1966).

Section 561.14(4), which requires exporters such as Bonanni to obtain a license and to comply with the bonding, filing, and inventory requirements we have described, violates the Commerce Clause of the United States Constitution and is invalid.

Nothing in our decision today should by construed as prohibiting the state from requiring exporters to register with the state for identification purposes.[6] A reasonable registration requirement would not, in the words of the federal constitution, interfere with congressional pow r "[t]o regulate commerce with foreign nations, and among the several States . . . ."

The decision of the trial court is affirmed.

OVERTON, C.J., BOYD, SUNDBERG and HATCHETT, JJ., Concur.
ADKINS and KARL, JJ., Dissent.

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6. Bonanni concedes that a reasonable registration requirement is not an unreasonable burden on interstate commerce.

IN THE SUPREME COURT OF FLORIDA, JANUARY TERM, 1978

THE DIVISION OF BEVERAGE, DEPARTMENT OF BUSINESS REGULATION, an agency of the STATE OF FLORIDA,

Appellant,

-vs-

BONANNI SHIP SUPPLY, INC.,

Appellee.

CASE NO. 51,582

Circuit Court Case No. 75-10612 Division "A"

MOTION FOR STAY

TO THE HONORABLE ARTHUR J. ENGLAND, JR., CHIEF JUSTICE, FLORIDA SUPREME COURT.

MAY IT PLEASE THE COURT:

The Appellant, Division of Beverage, Department of Business Regulation, an agency of the State of Florida, by and through its undersigned attorney, hereby asks this Court to stay the execution, enforcement and effect of its order in the above-styled cause, which it rendered on March 9, 1978, holding Section 561.14(4), Florida Statutes (1975), unconstitutional and in violation of the Commerce Clause of the United States Constitution. (See Exhibit 1). As grounds, the Appellant would show that:

1. At this time, the Appellant intends to appeal this Honorable Court's

decision to the United States Supreme Court.

2. Such an appeal is allowed by Petition for Writ of Certiorari, pursuant to 28 U.S.C. §2101(c), which states that:

> Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within 90 days after the entry of such judgment or decree. (Emphasis Supplied).

3. 28 U.S.C. §2101(f), states that:

> In any case in which the final judgment or decree of any court is subject to review by the Supreme Court on writ of certiorari, the execution and enforcement of such judgment or decree may be stayed for a reasonable time to enable the party aggrieved to obtain a writ of certiorari from the Supreme Court. The stay may be granted by a judge of the court rendering the judgment or decree or by a justice of the Supreme Court, and may be conditioned on the giving of security, approved by such judge or justice, that if the aggrieved party fails to make application

> for such writ within the period allotted therefor, or fails to obtain an order granting his application, or fails to make his plea good in the Supreme Court, he shall answer for all damages and costs which the party may sustain by reason of the stay. (Emphasis Supplied).

In the case of Williams v. Keyes, 186 So. 250, 267 (1938) the Supreme Court of Florida noted that:

> ...This Court has always looked with favor on any suggestion to have its orders or decrees reviewed by the Supreme Court of the United States and being so, applications or stay orders of the kind brought in question have been granted in rather pro forma manner.

The above cited case dealt with the Florida Supreme Court ordering a recall election in Dade County. The City Commissioners of Dade County subsequently filed a motion to stay execution and enforcement of the final judgment of this Court for 60 days to permit them to apply to the Supreme Court of the United States for writ of certiorari. The Florida Supreme Court granted the Commissioners' application for a stay, noting that:

> By the very terms of the act quoted (28 U.S.C. §350, now entitled 28 U.S.C. §2101), its application

> is limited to cases in which the judgment is subject to review by the Supreme Court on writ of certiorari.

The Court further noted that:

> ...If it is made to appear that the case is one that would likely be taken up on certiorari and one which the balance of convenience requires a suspension of its decree and a withholding of its mandate, the stay order should be granted.

5. Section 561.14(4), Florida Statutes (1975), was found to be repugnant to the Commerce Clause of the United States Constitution. This Court's decision was based on Federal law, and a construction of both the 21st Amendment and the Commerce Clause of the United States Constitution. Therefore, it appears likely that the United States Supreme Court could review this case pursuant to a writ of certiorari.

6. Pursuant to Fla. R. App. P. 5.12, the state or any of its political subdivisions need not post supersedeas bond unless expressly required by the Court.

Further, the staying of this Court's order would have only a negligible effect on the Appellees by requiring them to continue providing this agency with monthly inspection reports and on-site inspection of their in-bond merchandise.

7. Subsequent to this Court's order of March 9, 1978, the Division of Beverage

has received no information regarding the Appellee's in-bond merchandise, either from the Appellee or from United States Customs, and is, therefore, totally without knowledge of the shipment of alcohol and cigarettes through its borders, as well as any possible shortages from those shipments.

8. The Division of Beverage does not request a stay of this Court's order in order to deprive the Appellee of his remedies, but rather to maintain the flow of information to this agency until such time as the United States Supreme Court rules on its Petition for Writ of Certiorari.

9. As of the date of this motion, this agency has not received a mandate from this Court regarding this matter.

WHEREFORE, and for the above cited reasons, the Appellant, Division of Beverage, Department of Business Regulation, as an agency of the State of Florida, asks that this Court stay the execution and enforcement of its order entered March 9, 1978, for a period of 90 days, or in the alternative, until such time as the United States Supreme Court rules on its forthcoming Petition for Certiorari. The Appellant also asks that the Court allow it to proceed without posting bond due to the negligible financial requirements which the statute places on the Appellee.

Respectfully submitted,

/s/
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904/488-8846

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Motion for Stay has been sent by U.S. Mail, this _____ day of April, 1978 to Robert V. Williams, Esquire, 606 Madison Street, Post Office Box 1363, Tampa, Florida 33601.

RICHARD E. GENTRY

IN THE SUPREME COURT OF FLORIDA, MONDAY, APRIL 24, 1978

DIVISION OF BEVERAGE, DEPARTMENT OF BUSINESS REGULATION, etc.,

Appellant,

vs. : CASE NO. 51,582

BONANNI SHIP SUPPLY, INC.,

Appellee.

Appellant's motion for stay is hereby denied.

A True Copy

TEST:

/s/
Sid J. White
Clerk, Supreme Court

W
CC: Richard E. Gentry, Esquire

Robert V. Williams, Esquire

Supreme Court, U. S.
FILED
JUL 19 1978
MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-1803

THE DIVISION OF BEVERAGE, DEPARTMENT OF BUSINESS REGULATION, an agency of the STATE OF FLORIDA,

Petitioner,

v.

BONANNI SHIP SUPPLY, INC.,

Respondent.

****

ON WRIT OF CERTIORARI
TO THE FLORIDA SUPREME COURT

****

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

****

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ATTORNEYS FOR RESPONDENT

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IN THE SUPREME COURT OF THE UNITED STATES

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ON WRIT OF CERTIORARI
TO THE FLORIDA SUPREME COURT

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

WHETHER THE FLORIDA SUPREME COURT ERRED IN HOLDING THAT THE STATE'S REGULATORY SCHEME FOR EXPORTERS OF ALCOHOLIC BEVERAGES CREATED AN UNDUE BURDEN ON INTERSTATE COMMERCE IN VIOLATION OF THE COMMERCE CLAUSE OF THE UNITED STATES CONSTITUTION

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Respondent agrees with Petitioner's statement of the constitutional and statutory provisions involved in this case except that Respondent submits that the following statutory provisions were also materially involved in the decision under review.

FLORIDA STATUTES

Fla. Stat. §561.37 (1975) (Vol. 2, 1975 Florida Statutes, pages 941-42)

Section 561.37 Bond for payment of taxes.

. . . Each exporter shall file with the division a surety bond acceptable to the division in the sum of five thousand dollars as surety for the payment of all taxes; provided, however, that where in the discretion of the division the amount of business done by the exporter is of such volume that a bond of less than five thousand dollars will be adequate to secure the payment of all taxes assessed or authorized by the beverage law, the division may accept a bond in a lesser sum than five thousand dollars, but in no event shall it accept bond of less than one thousand dollars.

Fla. Stat. §561.41 (1975) (Vol. 2, 1975 Florida Statutes, page 942)

Section 561.41 Maintenance and designation of principal office by manufacturers, distributors and exporters.

Each manufacturer, distributor and

exporter licensed shall have within this state an office designated as its principal office within this state and may maintain branch offices within or without this state. The principal and branch offices within this state shall during regular defined business hours be kept open for the inspection of authorized employees of the division.

Fla. Stat. §561.55 (1975) (Vol 2, 1975 Florida Statutes, page 944-45)

Section 561.55 Manufacturers', distributors' and exporters' records and reports. -

(1) Manufacturers, distributors and exporters shall each keep a complete and accurate record and make reports showing the amount of beverages manufactured or sold within the state and to whom sold; also of all beverages imported from beyond the limits of the state and to whom sold; also all beverages exported beyond the limits of the state, to whom sold, the place where sold and the address of the person to whom sold. Manufacturers, distributors and exporters shall make full and complete report by the tenth day of each month for the previous calendar month. Said report shall be made out in triplicate, two copies of which shall be sent to the division, the third copy retained for the manufacturer's, distributor's or exporter's record. Reports shall be made on forms prepared and furnished by the division.

(2) All manufacturers, distributors and exporters licensed under the

beverage law shall maintain and keep for a period of three years at the licensed place of business such records of alcoholic beverages received, sold or delivered within or without this state as may be required by the division.

STATEMENT OF THE CASE

Respondent agrees that the Petitioner's Statement of the Case is substantially correct except that Respondent rejects certain implications which may be drawn from Petitioner's Statement and would augment the Statement of the Case as set forth below.

First, Respondent disputes Petitioner's implication that this case simply involves the State of Florida's right to require the Respondent to hold an exporter's license pursuant to Section 561.14(4), Florida Statutes. The Complaint filed by the Respondent in the trial court challenged the right of the state to require Respondent to file monthly reports and otherwise regulate Respondent's business through the licensing procedure.

Secondly, Petitioner's Statement of the Case implies that the Respondent did not timely raise the issue of the State's right to impose regulations on the Respondent's business under the Commerce Clause. There is no question that this issue was raised before the trial court as reflected in the final summary judgment entered by that court (Petitioner's Appendix pp. 14-15), and it was the sole issue considered by the Supreme Court of Florida on appeal. (Petitioner's Appendix pp. 17-24).

Lastly, Respondent wishes to include within the Statement of the Case the Florida Supreme Court's holding that:

> Section 561.14(4), which requires exporters such as Bonanni to obtain a license and to comply with the bonding, filing, and inventory

requirements we have described, violates the Commerce Clause of the United States Constitution and is invalid. (Petitioner's Appendix p. 24)

ARGUMENT

THE FLORIDA SUPREME COURT DID NOT ERR IN HOLDING THAT THE STATE'S REGULATORY SCHEME FOR EXPORTERS OF ALCOHOLIC BEVERAGES CREATED AN UNDUE BURDEN ON INTERSTATE COMMERCE IN VIOLATION OF THE COMMERCE CLAUSE OF THE UNITED STATES CONSTITUTION.

Although Petitioner divides its argument for granting the writ into two separate questions, the only issue involved in this case is whether the Florida Supreme Court's decision, holding that the state's regulatory scheme for exporters violates the Commerce Clause, is in accord with the prior decisions of this Court. For convenience, however, Respondent will attempt to dispose of Petitioner's arguments in the order in which they are raised in the Petition.

A. THE FLORIDA SUPREME COURT DID NOT DEPART FROM PRIOR DECISIONS OF THIS COURT IN HOLDING SECTION 561.14(4) UNCONSTITUTIONAL AS VIOLATIVE OF THE COMMERCE CLAUSE.

Petitioner's first argument is basically that Section 561.14(4) of the Florida Statutes is nothing more than a state license classification statute and that the state has the power to require such a license under the rationale of prior decisions of this Court. E.g., United States v. State Tax Commission of Mississippi, 412 U.S. 363 (1973); Hostetter v. Idlewild Bon Voyage Liquor Corporation, 377 U.S. 324 (1963). This argument, however, proceeds upon the

faulty assumption that the Supreme Court of Florida was considering only the question of whether the state could constitutionally require Respondent to hold an exporter's license. A brief examination of the opinion rendered by the Florida Supreme Court in this case shows that this assumption is incorrect.

In its opinion, the Florida Supreme Court framed the issue it was considering as follows:

> The ultimate question we are called upon to answer is whether the state's supplementary regulations, as set forth in Chapter 561 of the Florida Statutes, constitute an unreasonable burden on interstate commerce within the limitations established by the federal courts. (Petitioner's Appendix, pp.20-21)

The supplementary regulations specifically referred to by the Florida Supreme Court consisted of a $500 license fee pursuant to §561.14(4), Florida Statutes; a $5,000 bond to protect against tax loss if bonded liquor is diverted into state commerce pursuant to §561.37, Florida Statutes; monthly reports of the transfer of liquor into and out of the bonded warehouse pursuant to §561.55, Florida Statutes; and semi-annual physical inspections of the bonded warehouse pursuant to §561.41, Florida Statutes. The reason that §561.14(4) became the focal point of this litigation is that Respondent is subject to all of the other regulatory requirements of Chapter 561 simply because Respondent must obtain an exporter's license pursuant to §561.14(4). It is the fact that Respondent holds the

license that automatically triggers the operation of the rest of the state's regulatory scheme.

Petitioner contends that §561.14(4) "does no more than permit the state to identify those persons authorized to warehouse and transport" in-bond liquor and that the Florida Supreme Court has misapplied the doctrine of undue burden upon interstate commerce in striking down this simple classification statute (Petition p. 7). This argument, however, ignores the facts of this case and the holding and reasoning of the Florida Supreme Court. The holding of the Florida Supreme Court was that:

> Section 561.14(4), which requires exporters such as Bonanni to obtain a license and to comply with the bonding, filing and inventory requirements, we have described, violates the Commerce Clause of the United States Constitution and is invalid. (Petitioner's Appendix p. 24).

Thus, the lower court did not hold, as Petitioner contends, that a simple license classification statute was unconstitutional. Rather, it was the entire regulatory scheme which the Florida Supreme Court found to be objectionable. Indeed, this interpretation of the lower court's opinion is bolstered by the fact that the Florida Supreme Court expressly recognized that its decision did not prohibit the state from requiring exporters to register with the state for identification purposes. (Petitioner's Appendix p. 24).

Therefore, since the Florida Supreme Court's decision was grounded on a consideration of the state's extensive regulation of Respondent's in-bond liquor business, and was not a determination that the state could not license Respondent for identification purposes, the decision of the Florida Supreme Court is not in conflict with prior decisions of this Court authorizing the use of license classification procedures.

B. THE FLORIDA SUPREME COURT HAS NOT ANNOUNCED A NEW TEST FOR DETERMINING WHETHER STATE REGULATION VIOLATES THE COMMERCE CLAUSE.

Petitioner contends that the Florida Supreme Court, in rendering its present decision, did not apply the traditional commerce clause test of whether state regulation constitutes an undue burden on interstate commerce. Rather, Petitioner argues that the lower court has "blurred the distinction between the test for an undue burden on interstate commerce and the doctrine of federal preemption", and has announced the new test of "whether there was duplicative federal regulation". (Petition p.8). Again, an examination of the Florida Supreme Court's opinion in this case shows that Petitioner's contention is incorrect.

Initially (in its opinion) the Florida Supreme Court couched the issue in this case in terms of the traditional Commerce Clause test by stating:

> The sole issue for review is whether the state's regulation of Bonanni's import-export activity constitutes an un-

> reasonable burden on interstate commerce under the federal constitution (Petitioner's appendix p. 18).

After recognizing the state's legitimate police power objective of preventing diversion of in-bond liquor into in-state commerce, and after considering the extensive federal regulation of Respondent's business, the Florida Supreme Court relied on Epstein v. Lordi, 261 F. Supp. 921 (D.N.J. 1966), aff'd per curiam 389 U.S. 29 (1967), to hold that the state's regulatory activity was not reasonably necessary to accomplish the state's objective of preventing diversion. The lower court did not hold, as Petitioner contends, that state regulation must always fall in the face of federal regulation. Rather, the lower court held that, on the facts of this case in light of the pervasive federal regulation of Respondent's business, the state regulation was unnecessary, and therefore, constituted an unreasonable burden on interstate commerce. Obviously, this decision was rendered in accordance with prior case law setting forth the traditional Commerce Clause test.

This conclusion is mandated by a consideration of Epstein v. Lordi, supra, which was heavily relied upon in the Florida Supreme Court's opinion. In Epstein, the court considered a factual situation which was closely akin to the present case. In that case, New Jersey had attempted to extensively regulate an in-bond liquor business which was also heavily regulated by the federal government. The Epstein court recognized as did the Florida Supreme Court in the present case, that the issue before it was whether the state regulation was reasonably necessary in light of comprehensive federal regulation. As the Epstein court recognized:

> [T]he significance of the Federal scheme lies in the fact that it delineates both the local and the national interests which must be weighed in assessing the "reasonable necessity" of the burden imposed by the wholesale license requirement. In other words, the court must determine whether the burden imposed on foreign commerce, and on the national interest therein, is justified by "the character of the local interests and the available means of protecting them". 261 F. Supp. at 936-937.

The local interest recognized by the Epstein court was the same as that in the present case - the prevention of diversion. This is the legitimate state interest, but as the Epstein court noted, to the extent that the federal regulatory scheme minimized the danger of diversion it likewise reduced the justifiable scope of state regulation. 261 F. Supp. at 937. In Epstein, the court concluded that the comprehensive federal regulation was ample to protect against diversion and therefore the state regulation was unnecessary to accomplish the state objective and constituted an unreasonable burden on interstate commerce.

This same conclusion was obviously drawn by the Florida Supreme Court in the present case. In holding that the state's regulatory scheme violated the Commerce Clause, the court below reasoned:

> Obviously, the license fee and bonding requireme provide no protection for the state against diversion. Similarly, the filing of monthly reports offers

> nothing to the state which the federal government does not already have; indeed, Bonanni attaches to the state's form each month a copy of the report it files with the federal government for the same purpose. The one state activity that has no counterpart in the federal scheme of regulation is the semi-annual physical inventory. Since we discern no information regarding diversion that might emerge from the state's physical inventory which would not also be revealed by the paper and physical inventories provided by the federal government, we must conclude that the state's attempt to monitor for diversion is merely duplicative of the federal effort. (Petitioner's appendix pp. 22-23).

The Florida Supreme Court did not hold that state regulation was preempted by the federal regulatory activity. Instead, the lower court merely held that the state regulatory scheme was unnecessary and did not provide any protection against diversion not already provided by the comprehensive federal regulation. This holding is totally consistent with Epstein v. Lordi, supra, and is an application of the traditional Commerce clause test.

Similarly, the cases relied upon by Petitioner are clearly distinguishable and do not require or even suggest that the Florida Supreme Court should have reached a different result. In both Duckworth v. Arkansas, 314 U.S. 390 (1941), and United States v. State Tax Commission of Mississippi, 412 U.S.

363 (1973), this Court merely recognized that a state may, in the absence of conflicting regulation, properly exercise its police powers to regulate and control shipments of liquor through its territory insofar as necessary to prevent the unlawful diversion of liquor into the internal commerce of the state. The present decision of the Florida Supreme Court is consistent with this concept as the present court held that the state's regulatory activity was not reasonably necessary to guard against diversion.

Thus, since the Florida Supreme Court did not hold that state regulation was preempted by the federal regulatory activity, Petitioner's second reason for granting the Writ is without merit. The decision of the lower court in this case is consistent with the reasoning and holding of Epstein v. Lordi, supra, and was grounded on the traditional Commerce Clause test of whether the state regulation constituted an unreasonable burden on interstate commerce. Since Petitioner can point to no prior decision of this Court which conflicts with the lower court's decision in the present case, and since the lower court has correctly applied the Commerce Clause test as set forth in earlier decisions of this Court, the Petition for Writ of Certiorari should be denied.

CONCLUSION

For the reasons and authorities set forth in this brief, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

GIBBONS, TUCKER, McEWEN,
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IN THE SUPREME COURT OF THE UNITED STATES

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Petitioner,

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BONANNI SHIP SUPPLY, INC.,

Respondent.

****

REPLY BRIEF OF PETITIONER

****

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. _____

THE DIVISION OF BEVERAGE,
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QUESTIONS PRESENTED

1. Whether Florida's requirement that exporters of alcoholic beverages obtain licenses under §561.14(4), Florida Statutes (1975), creates an undue burden on interstate commerce in violation of the Commerce Clause.

2. Whether the Florida Supreme Court erred in holding that §561.14(4), Florida Statutes (1975), was an unreasonable burden on interstate commerce because of the presence of concurrent federal regulation of exporters.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

ARTICLE I, §8

(Clause 3) The Congress shall have power . . . to regulate commerce with foreign nations, and among the several states and with the indian tribes: . . .

AMENDMENT XXI

Section 2. The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

FLORIDA STATUTES (1975)

Section 561.14 License classification.--

Licenses referred to in the beverage law shall be classified as follows:

(4) Exporters licensed to transport tax exempt alcoholic beverages into this state under bond, to be exported under bond for delivery beyond the borders of this state. Each license shall entitle the licensee to store such beverages under bond at one location in this state pending shipment beyond the borders of this state. Florida Statutes, 1975, Volume II, page 932.

REASONS FOR GRANTING THE WRIT

I. FLORIDA'S REQUIREMENT THAT EXPORTERS OF ALCOHOLIC BEVERAGES OBTAIN LICENSE UNDER §561.14(4), FLORIDA STATUTES, DOES NOT CREATE AN UNDUE BURDEN ON INTERSTATE COMMERCE IN VIOLATION OF THE COMMERCE CLAUSE.

The judgment upon which appeal was taken to the Florida Supreme Court succinctly holds:

(Appendix to Petition for Writ of Certiorari at page 15).

> 5. It is, therefore, the holding of this Court that the requirement that Plaintiff obtain an exporter's license from the State of Florida to engage in the business of importing and exporting "in bond" merchandise for distribution and use in foreign commerce, violates the provisions of the Commerce Clause of the United States Constitution (Article I, Section 8, Clause 3). Accordingly, Section 561.14(4), Florida Statutes is hereby declared unconstitutional and invalid as being violative, and in contravention, of the Constitution of the United States of America.

Section 561.14(4), Florida Statutes, as held violative of the Commerce Clause states:

> Section 561.14 License Classification.--
>
> Licenses referred to in the beverage law shall be classified as follows:
>
> (4) Exporters licensed to transport tax exempt alcoholic beverages into this state under bond, to be exported under bond for delivery beyond the borders of this state. Each license shall entitle the licensee to store such beverages under bond at one location in this state pending shipment beyond the borders of this state. Florida Statutes, 1975, Volume II, page 932.

The Respondent contends that the Supreme Court of Florida properly framed the principal issue and thereafter correctly applied the prior decisions of this Court. The issue presented (Appendix to Petition for Writ of Certiorari at pages 20-21) is whether the state's supplementary regulations constitute an unreasonable burden on interstate commerce. Yet, the holding of the Court struck down not only the supplementary regulations but the implementing statute, Section 561.14(4), Florida Statutes.

It is inconceivable that the Supreme Court of Florida could have even considered the state's regulations implemented pursuant to Section 561.14(4), Florida Statutes, based upon the holding of the trial court, supra. The gravaman of the appeal sub judice is whether Section 561.14(4), Florida Statutes, is repugnant to the Commerce Clause.

The holding of the Florida Supreme Court is obscurred by these references to the state's supplementary regulations. The issue was and remains whether the act of the Florida Legislature, Section 561.14(4), Florida Statutes, constitutes an undue burden on interstate commerce. Rhetorically, Petitioner asks whether the State of Florida may classify and license exporters of alcoholic beverages where such classification alone creates no burden and creates no limitation on the power of Congress to regulate foreign commerce. The opposite view has been consistently rejected by this Court in Hostetter v. Idlewild Bon Voyage Liquor Corporation, 377 U.S. 324, 84 S.Ct. 1293, 12 L.Ed. 2d 350 (1963) and supporting cases cited in the Petition for Writ of Certiorari at page 6. Even Epstein v. Lordi, 261 F.Supp. 921, (D.N.J. 1966), aff'd. per curiam 389 U.S. 29 (1967), relied upon by the Florida Supreme Court and noted by Respondent, recognized that where state action does not interfere with the free flow of foreign commerce beyond that which is reasonably necessary to prevent the distribution of liquor into intrastate commerce, the Commerce Clause is not violated. See Epstein v. Lordi, supra, 261 F.Supp. at 936, n. 13, quoting the above rationale announced in Duckworth v. Arkansas, 314 U.S. 390, 62 S.Ct. 311, 86 L.Ed. 294 (1941). The mere fact that an exporter may be required to obtain a license does not in itself suggest that the state's activity constitutes a burden on interstate commerce. That is the crux of this appeal.

The Florida Supreme Court has suggested that their decision does not prohibit the state from requiring exporters to register for identification purposes only. (Petition for Writ of Certiorari at page 24). Yet, by affirming the lower court's holding that Section 561.14(4), Florida Statutes, is

unconstitutional the state is effectively precluded from following that mandate.

The Florida Court is opining that the state may not regulate, oversee, monitor, or classify exporters of alcoholic beverages for any purpose in the face of the existence of concurrent federal regulation. Such conclusion is contrary to the holdings of this Court in Duckworth, supra, and Carter v. Commonwealth of Virginia, 321 U.S. 132, 135-136, 64 S.Ct. 465, 466 (1944).

II. THE FLORIDA SUPREME COURT ERRED IN HOLDING THAT §561.14(4), FLORIDA STATUTES, WAS AN UNREASONABLE BURDEN ON INTERSTATE COMMERCE BECAUSE OF THE PRESENCE OF CONCURRENT FEDERAL REGULATION OF EXPORTERS.

Respondent misplaces the importance of Epstein v. Lordi, supra, as relied upon by the Florida Supreme Court. In Epstein, New Jersey required that exporters obtain wholesaler's licenses, which are, as in Florida, comprehensive and restrictive. The Epstein decision is simply inapplicable here in that the intricate requirements imposed upon Florida wholesalers are primarily designed to regulate intrastate commerce and the multitude of sins commensurate with that trade and practice. Florida recognizes the essential differences between exporters and wholesalers and therefore classifies them under separate provisions of law, which New Jersey did not. Even the license fees are different in Florida--$500 for an exporter, versus $4,000 for a wholesaler. The holding in Epstein was based upon the burdens placed upon the wholesaler which restricted the free

flow of foreign commerce. Epstein never held that exporters could not be classified, for license purposes, as was the holding of the Florida Supreme Court in this case.

The Florida Court was troubled by the issue in Epstein, i.e., whether the police power exercised by the state was reasonably related to the prevention of the diversion of non-taxed liquor into intrastate commerce. Though this may be a legitimate concern the striking of Section 561.14(4), Florida Statutes, is tantamount to the destruction of a sturdy table because the surface is blemished. Such action of the Florida Supreme Court should be reviewed and reversed.

CONCLUSION

For the reasons set forth above, Petitioner prays that the Petition for Writ of Certiorari be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three (3) copies of the foregoing Reply Brief have been furnished by U.S. Mail to Robert V. Williams, Esquire, 606 Madison Street, Post Office Box 1363, Tampa, Florida 33601, Attorney for Respondent, this 18th day of August, 1978.

Francis Bayley
FRANCIS BAYLEY